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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner,

vs.

TYRIS LEMONT HARVEY
Respondent.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONER

WAYNE COUNTY PROSECUTOR'S OFFICE

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STATEMENT OF THE QUESTION

MAY A DEFENDANT BE IMPEACHED WITH A
STATEMENT TAKEN SUBSEQUENT TO HIS
ASSERTION OF HIS SIXTH AMENDMENT
RIGHT TO COUNSEL AS CONSTRUED BY
MASSIAH V UNITED STATES AND
MICHIGAN V JACKSON?

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and appended as Appendix A in the Petition for Certiorari. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B in the Petition for Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 18, 1988. The order of the Michigan Supreme Court was entered on August 24, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part, that in all criminal

prosecutions the accused shall have the right to "the assistance of counsel in his defense."

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

The victim in this case, Audrey Sharp, testified that on June 11, 1986 respondent rang her doorbell at about 2:30 in the morning (R, 12). Respondent had been to Ms. Sharp's house twice previously, and she had seen him in the neighborhood. She knew him only as "T" (R,10-11). Respondent asked to use the telephone, and was admitted by Ms. Sharp. He went to the telephone, and Ms. Sharp sat at the kitchen table (R, 12-13). Respondent then approached Ms. Sharp from behind with a barbecue fork in hand (R,13). Respondent demanded that Ms. Sharp get up from the table. As she complied, she grabbed respondent's hand (R,16). The two struggled down the basement steps to the landing, where respondent placed his hand over Ms. Sharp's mouth and said "Shut up,

bitch, shut up." Ms. Sharp was yelling for "Johnny," her ex-husband, who was not actually at home, to make respondent believe someone was in the home (R,17-18). Ms. Sharp then bit respondent's hand, and respondent bit her in the back.

As the struggle continued respondent picked up some garden shears from the landing. The two struggled back up the stairs into the kitchen. Respondent "flipped" Ms. Sharp and then punched her in the face (R,18). Respondent then pursued Ms. Sharp to the living room, where he made her take off her clothes (R,24). Respondent still had the barbecue fork and garden shears in his hand. He then committed an act of cunnilingus upon Ms. Sharp (R,25-26), and forced intercourse on her (R,26). As he left, respondent told Ms. Sharp that "If you tell anyone or

anyone comes after me, I will be back...."
(R,27).

Ms. Sharp did not report the crime until two days later, testifying that she was afraid of respondent (T, 28-29). She was later treated at the hospital for facial injuries from the punches to the face (R, 31). She had suffered three fractures of the left eye socket (R,75). Ms. Sharp admitted that she used crack cocaine once or twice a week, but stated she had not used crack that day, nor had she ever "done" crack with respondent. She also testified that respondent had never offered to buy cocaine for her in exchange for sex, and was not at the house at 9:00 p.m. (R,32-33).

On cross examination Ms. Sharp denied that she had agreed to exchange sexual favors for cocaine from respondent, that

she had ever had sex with respondent previously, or that she had ever gotten high with respondent (R, 72).

Respondent testified that about 9 p.m. on the evening in question he was passing by Ms. Sharp's house, saw her on her porch, and went to talk with her (R,97). He asked her if she wished to smoke some "caine," she responded yes, and the two of them went into the house. As they smoked he asked if she wished to "turn some favors" and she said yes. Ms. Sharp's sister then arrived, according to respondent, and also wanted some cocaine, so respondent left with the sister to get more cocaine (R,98-99). When he returned another male was present, and they all smoked cocaine, but eventually the other male and the sister left. Respondent then requested Ms. Sharp to "turn that favor," and she refused and told him to

leave. He stated he would not leave until he got money or some cocaine "or something" (R,99).

Respondent testified that Ms. Sharp then attacked him with a barbecue fork, and he struck her in the eye. A struggle followed, including mutual biting (R,99-100). At this point, according to respondent, Ms. Sharp "just took off her pants and got on the couch." She then attempted to assist him to perform intercourse, but he was unable to perform (R,100). She became angry and ordered him out, resulting in a further struggle, in which respondent again punched Ms. Sharp (R, 100). Finally he left (R,100).

Respondent also testified that he had "gotten high" on prior occasions with Ms. Sharp, and that he was out of the house by approximately 10:30 p.m. (R,101-102).

On cross examination the assistant prosecuting attorney confronted respondent with a statement he made to the police on July 2, 1986. Respondent testified that he had signed only the first page of the statement, and not the other pages, because "she (the officer) wrote some stuff I didn't like" (R,111). The prosecutor asked "Do you remember being asked the question 'were you there on June 11, 1986 at 2:30 am?' and responding 'I don't know the date'?" Respondent answered "yes," and the prosecutor then asked "You didn't tell her at that point that you had been there at nine o'clock in the morning -- at nine o'clock at night instead of 2:30, did you?" and respondent answered that he had not (R,112). Further questions regarding inconsistencies between the statement and respondent's trial testimony were asked (R,113-114).

The prosecutor then asked respondent "You gave a statement in this matter last week, too, didn't you?" Respondent answered that he had. The prosecutor asked "And you gave her (the officer) that statement because, again, you wanted to give her as much information as you could because you feel you are not guilty of this crime, correct?" to which respondent answered "yes." (R,116). At that point the prosecutor began to question respondent regarding that statement. The Michigan Court of Appeals opinion states:

"Defendant was arraigned on July 2, 1986, and counsel was appointed. On September 9, 1986¹, six days before trial,

1. Court orders reveal that the trial judge had ordered, on defense request, that defendant be given a polygraph examination, and that a writ of habeas (con't)

defendant told another police officer that he wanted to make another statement, but he didn't know if he should talk to his lawyer. The officer told him that he didn't need to talk to his lawyer because his lawyer was going to get a copy of the statement anyway. Defendant then signed a constitutional rights waiver form. Defendant initialed the following rights:

1. (cont'd) corpus for this purpose was issued on September 8, 1986, and executed September 9, 1986. Thus, it appears that the polygraph occurred on the same date as did the interview in question. Michigan has a peculiar statute which mandates a polygraph upon request in criminal sexual conduct cases, though the results are inadmissible for any purpose at trial, solely as an aid to the prosecutor in his charging/prosecution decisions, though there is no requirement that the prosecution give any consideration whatever to the results. See MCL 776.21(5).

1)I have the right to remain silent and I do not have to answer any questions put to me or make any statements; 2)I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statements; and 3)if I cannot afford an attorney (lawyer), one will be appointed for me without cost by the court prior to any questioning. Defendant did not initial the following rights: 1)any statement I make or anything I say will be used against me in a Court of Law and 2)I can decide at any time to exercise my rights and not answer any questions or make any statement. When asked if he understood his constitutional rights, defendant responded: "Yes." Defendant then gave a detailed statement different from

his first statement, but essentially similar to his trial testimony."

"When the prosecutor attempted to impeach defendant with the second statement, defense counsel objected. The prosecutor conceded that the second statement could not be used in her case in chief because it was taken in violation of defendant's Miranda rights; however, she argued that she could use it for impeachment purposes because it did not appear to be involuntary, citing Harris v New York....Defense counsel had no objection to the prosecutor using the second statement for impeachment purposes....The prosecutor used the statement to impeach defendant by pointing out that defendant had failed to include some of his trial testimony

in the second statement even though it was only given six days earlier" (Opinion of the Michigan Court of Appeals, Petition for Certiorari, 3a-5a).

Respondent testified that the statement was his, that he signed it after he read it, that he had the opportunity to make any changes that he wished to, and that everything he had said in his statements and in his testimony had been the truth (R, 118, 131). He also was asked by his counsel on redirect "Now, did your story differ in any way from what you told the officer the second time than what you testified to today in Court? Other than some facts that are not in here?" Respondent answered "No."

The prosecutor gave a closing argument arguing the issue of credibility, and noting the differences between defendant's statements and his trial testimony (R,134). The case was tried to the court, and the trial judge convicted, finding Ms. Sharp to be credible (R,146-149). Respondent received a sentence of 6-10 years.

On appeal the Michigan Court of Appeals reversed, holding that "If defendant's second statement was made only in violation of his Fifth Amendment Miranda rights, we would hold likewise (that impeachment was appropriate); however, this statement was also made in violation of defendant's Sixth Amendment right to counsel. See e.g. Michigan v Jackson....A statement so acquired may not be used for any purpose, including impeachmentBecause this case involved a

credibility contest between defendant and the victim, we cannot say that the error was harmless beyond a reasonable doubt."

The Michigan Supreme Court denied leave, three justices dissenting. This Court then granted the Petition for Certiorari.

SUMMARY OF ARGUMENT

The issue presented by this case is whether, consistent with the Constitution, a statement taken from an accused in violation of his Sixth Amendment right to counsel as construed by Massiah v United States and Michigan v Jackson may be used by the prosecution to impeach the testimony of the accused when he or she testifies at trial. The Michigan Court of Appeals answered this question in the negative in this case. Petitioner disagrees.

First, in order to assess the appropriateness of attachment of an exclusionary remedy extending even to impeachment use of the statement, it is necessary to consider the nature of the constitutional violation which has occurred. Petitioner submits that Massiah is itself on less than firm constitutional

footing, so that at the very least this Court should extend it no further. Because, then, it is questionable whether the constitution has been violated at all, impeachment use of the statement should be permitted.

Second, this Court has permitted impeachment with evidence seized in violation of the Fourth Amendment, and with statements taken in violation of Miranda, including statements taken after invocation of the Miranda counsel right. The only circumstance where impeachment has been disallowed is where the statement was involuntary, because the Fifth Amendment is concerned precisely with testimonial evidence. Petitioner submits that the instant case falls within the rationale of this Court's cases in the Fourth Amendment and Miranda context, so that impeachment should be permitted.

ARGUMENT

THIS COURT SHOULD HOLD THAT A DEFENDANT MAY BE IMPEACHED WITH A STATEMENT TAKEN SUBSEQUENT TO HIS ASSERTION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AS CONSTRUED BY MASSIAH V UNITED STATES AND MICHIGAN V JACKSON.

The question involved in this case is whether, assuming (or given) that a statement was obtained from the criminal accused in violation of the Sixth Amendment right to counsel as construed in Massiah v United States, 377 US 201 (1964) and Michigan v Jackson, 475 US 625 (1986), that statement should be admissible for impeachment purposes at trial. In discussing the appropriateness of extending an exclusionary remedy to cover impeachment, however, it becomes necessary to discuss the nature of the violation which has occurred itself, and, to a degree at least, the constitutional pedigree of those cases which hold that police conduct

such as that in the instant case violates the Sixth Amendment. It will be argued in Part A, below, that Massiah "is the decision in which Sixth Amendment protections have been extended to their outermost point," Henry v United States, 447 US 264, at 282 (1980) (Justice Blackmun, dissenting), so that, at a minimum, the Court should decline to "expand them more." Maine v Moulton, 474 US 159, 190 (1985) (Chief Justice Burger, dissenting). In Part B the question of impeachment use of "illegally" obtained evidence will be discussed more directly.

A. From Massiah to Jackson

Equality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment.¹

1. Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich L Rev 662, 677 (1986).

The Cases

Sixth Amendment right to counsel law as it relates to the law of confessions and admissions begins with Massiah. After arraignment Massiah discussed his case with his accomplice, Colson, in Colson's automobile, not knowing that Colson was cooperating with authorities and that the conversation was being overheard electronically. Stating that its view "no more than reflect(ed) a constitutional principle established as long ago as Powell v Alabama," the majority of the Court found that Massiah was entitled to the assistance of counsel during this "secret interrogation" sponsored by the police because he had been arraigned, and the Sixth Amendment right to counsel had thus attached. Quoting from Powell v Alabama, 287 US 45 (1932) the Court buttressed its

conclusion by observing that "during perhaps the most critical period of the proceedings...that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation (are) vitally important, the defendants...(are)as much entitled to such aid (of counsel) during that period as at the trial itself." 377 US at 205.

Justice White, joined by Justices Clark and Harlan, dissented. Justice White noted that "It is...a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it--whether the accused committed the act with which he is charged." 377 US at 208. On the merits of the Sixth Amendment counsel rule which the

Court had established, he stated that "Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism--an unsound one, besides--to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." 377 US at 209. It was the conclusion of the dissenting Justices that voluntariness should be the rule for admission of confessions, which "is a wiser rule than the automatic rule announced by the court, which requires courts and juries to disregard voluntary admissions which they might well find to be the best possible evidence in discharging their

responsibility for ascertaining truth." 377
US at 213.

Given the Court's reliance on Powell, a review of that case is in order. Powell involved, of course, the infamous "Scottsboro boys" case, where six black defendants, accused of the rape of two white females, were divided into three groups for trial, each trial was conducted in a single day, and all defendants were convicted and sentenced to death. No lawyer had been designated to represent them until the very morning of trial. It was in this context that this Court held that during the period of time between arraignment and trial the defendants were "as much entitled " to the aid of counsel as during the trial itself, concluding that "the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due

process" (emphasis added). 287 US at 71. That which occurred in Massiah and that which occurred in the instant case cannot reasonably be said to be akin to that which occurred in Powell--neither Massiah nor respondent were denied a reasonable time and opportunity to obtain counsel; indeed, both had counsel, in respondent's case, appointed counsel, to assist them at every step of the proceedings, including the planning of strategy. If the Sixth Amendment truly precludes police discussions with a criminal accused after the institution of formal judicial proceedings, some stronger basis than Powell is required to justify it.

Perhaps the most "notorious"² of Massiah's progeny is Brewer v Williams, 430

2. Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Columbia L Rev 1137 (1987)

US 387 (1977), often known as the "good Christian burial speech" case. Williams had been arrested for the kidnapping of a young girl, whose whereabouts had not yet been determined. He was repeatedly "Mirandized," arraigned, and consulted with two lawyers. He was to be driven by the police from the city of his arrest to the city where the kidnapping had occurred, and his lawyer was not allowed to accompany him during the trip. There was also a claim that before the trip the police detective had promised not to interrogate Williams during the trip. As they traveled the detective, who believed the victim to be dead, gave the "good Christian burial speech." He talked about the desire of the parents to have a Christian burial for their daughter, noted that it was Christmas Eve, referred to the fact that the weather conditions might soon make it impossible

for the body to be found, and concluded by telling Williams not to answer but to "think about it." After a period of time Williams told the police he would take them to the body, and did so.

Because Williams had been arraigned in the city of his arrest, the case was treated as a Sixth Amendment case rather than a Fifth Amendment case. Interestingly, had the police simply deferred arraignment to the city where the crime occurred, the Sixth Amendment would have had no application. As Professor Grano has stated, "To many observers this line drawing analysis demonstrates the merit of the claim that Justice Stewart's sixth amendment jurisprudence exalts form over substance." Grano, Rhode Island v Innis: A Need To Reconsider The Constitutional Premises Underlying The Law

Of Confessions, 17 Am Cr L Rev 1,9 (1979). But given Massiah, the issue was not whether Williams had a right to counsel, but whether he had appropriately waived it, and it was this issue which split the Court five to four, the majority finding that waiver had not been demonstrated. In dissent again, Justice White referred to the majority's reading of Massiah as creating a "right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence, and that the right not to be asked questions must be waived before the questions are asked." 430 US at 436. Justice Blackmun, also dissenting, observed that in his view an important factual predicate to Massiah was that Massiah "did not even know that he was under interrogation by a government agent." 430 US at 441, fn 3.

In his analysis of Brewer v Williams Professor Uviller has made the following observation regarding the majority opinion:

...the Court was not really saying that the lawyer should have been included on the long, snowy drive to Des Moines. They were saying Williams should not have been encouraged to disclose the contents of his mind at that stage. Had the lawyer been permitted to ride with them, he would not have allowed Williams to lead the police to the victim's body. Without the lawyer in the car, the police should not have enjoyed a more favorable position. One way or the other, with counsel present or without, interrogation or its equivalent is precluded after accusation. That is the decision's unmistakable thrust.

Uviller, 87 Columbia L Rev at 1162.

A trio of later "informant" cases also raise Sixth Amendment issues: United States v Henry, 447 US 264 (1980), Maine v Moulton, 474 US 159 (1985), and Kuhlmann v Wilson, 477 US 436 (1986). The first of the three, United States v Henry, involved conversations undertaken by an informant

with an indicted and jailed defendant--Henry. An FBI agent advised the informant, himself a prisoner, to be "alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry" regarding the charged offense. 447 US at 266. Henry did make statements to the informant. The majority of the Court held that admission of testimony as to Henry's statements to the informant was a violation of Massiah, because the informant "was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminating statements were 'the product of this conversation.'" 447 US at 271. Thus, because the government had "deliberately elicited information" from Henry after the attachment of the right to counsel, the evidence was inadmissible. The majority

also observed that "Although both the Government, and Mr. Justice Rehnquist in dissent, question the continuing vitality of the Massiah branch of the Sixth Amendment, we reject their invitation to reconsider it." 447 US at 269, fn 6.

Justice Blackmun, joined in dissent by Justice White, stated that "For purposes of this case, I see no need to abandon Massiah...as Mr. Justice Rehnquist does" (emphasis added). 447 US at 277, fn 1. It was his view that "Massiah certainly is the decision in which Sixth Amendment protections have been extended to their outermost point" and that the majority opinion was an expansion for which he could "not perceive any good reason." 447 US at 282.

As indicated in the majority opinion, Justice Rehnquist in dissent took the position that "Massiah constitutes such a

substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding should be re-examined." 447 US at 290. Justice Rehnquist concluded:

...there is nothing in the Sixth Amendment to suggest, nor does it follow from the general accusatory nature of our criminal scheme, that once the adversary process formally begins the government may not make any effort to obtain incriminating evidence from the accused when counsel is not present....there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution. To the extent the accused is protected from revealing evidence that may be incriminatory, the focus must be on the Fifth Amendment privilege against compulsory self-incrimination.

447 US at 295-296.

Next came Maine v Moulton, 474 US 159 (1985). Once again an informant was employed, an accomplice of Moulton named

Colson (interestingly enough, the accomplice/informant in Massiah was named Colson). Moulton had been charged with receiving stolen property, and had obtained retained counsel. Colson informed the police that he had been threatened regarding the charges, and wished to speak further with them. As a result, Colson became a government witness in the pending prosecution, and also disclosed that Moulton had discussed a plan to kill a witness. Colson agreed to have a recording device placed on his telephone, with instructions to turn it on when he received a call, but only to leave it on if the call was a threat from the anonymous caller or a call from Moulton.

Three telephone conversations between Colson and Moulton were taped, and a meeting between the two was agreed upon, at which Colson was wired with a body

transmitter. The meeting included a lengthy discussion of the pending charges, and a discussion of the idea of eliminating witnesses, which was discussed only briefly. Statements made in the conversations on the telephone and at the meeting were admitted against Moulton.

A majority of the Court affirmed the state court's reversal, relying upon Massiah and Henry, and holding that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."³ 474 US at 171. The State argued that in both Massiah and Henry the government had initiated the confrontation between the accused and the police, whereas

3. Professor Uviller has noted that the opinion marks the "first negative affirmative obligation in jurisprudence." Uviller, p.1163, fn 96.

in the case before the Court it was Moulton who called Colson and Moulton who arranged the face-to-face meeting. The majority found this distinction irrelevant; rather, though statements obtained after the right to counsel "by luck or happenstance" would be admissible, any "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity" (emphasis added). 474 US at 176. Noting the legitimate desire of the Government to investigate other crimes or threats, the Court concluded that while evidence as to the pending case must be suppressed, "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was

obtained...would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 US at 180. Consequently, those statements could be admitted.

In a dissent joined by three other justices (Justice O'Connor joining only as to Parts I and III), Chief Justice Burger referred to the result as "bizarre." He concluded by quoting from Justice Blackmun's dissent in Henry that "Messiah certainly is the decision in which Sixth Amendment protections have been extended to their outermost point," and stating that he would "not expand them more and well beyond the limits of precedent and logic." 474 US at 190. He also expressed doubt as to the wisdom of applying the exclusionary rule, even if a finding of a Sixth Amendment violation was justified.

The final case in the "informant"

trilogy is Kuhlmann v Wilson. Wilson was charged with a murder of a taxicab dispatcher and arraigned. In his cell in jail was an inmate who was an informer, and who had been instructed by the police to start no conversations with Wilson, but to listen to anything Wilson might say about the crime. Wilson eventually told the informant that he had planned and carried out the robbery with two others, and that the dispatcher had been murdered.

Reversing the lower court, the majority of the Court (only a plurality existed as to a habeas corpus issue, but six Justices agreed upon the merits of the counsel/confession issue) applied Massiah, Henry, and Moulton to reach the conclusion that the case was the other side of the coin from Henry. Justice Powell, writing for the majority, noted that "the primary

concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation....the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks." 477 US at 459. The dissenting Justices disagreed, principally on the ground that in their view the state "intentionally created a situation in which it was foreseeable that respondent would make incriminating statements without the assistance of counsel." 477 US at 476.

The case most directly related to the instant case is Michigan v Jackson, 475 US 625 (1986). The defendants in two cases consolidated for hearing by the Court had both been arraigned and requested counsel, and were subsequently "Mirandized" and made

incriminating statements. Taking its cue from the Fifth Amendment holding of Edwards v Arizona, 451 US 477 (1981) that a defendant who invokes his Miranda counsel right cannot thereafter be interrogated unless he initiates the conversation, the Court held that the same rule would apply when the defendant invokes his Sixth Amendment counsel right affirmatively at judicial proceedings. The dissenting Justices disagreed with this syllogistic importation of Edwards into the Sixth Amendment--1) Edwards created a bright-line rule to protect a defendant's Fifth Amendment rights; 2) Sixth Amendment rights are even more important than Fifth Amendment rights; 3) therefore, Edwards must apply to the Sixth Amendment, 475 US at 637 --observing that the basis of Edwards was to insure that statements were voluntary, whereas the Sixth Amendment serves different purposes. The dissent also noted

the peculiar situation in which the majority opinion left the law: though the Sixth Amendment right attaches at the institution of formal judicial proceedings, the Jackson Sixth Amendment right not to be approached only attaches after assertion of the right to counsel (in the cases before the Court, at arraignment). If the Sixth Amendment right attaches, but is not affirmatively asserted; for example, if the defendant at arraignment declines appointed counsel because he or she wishes to retain counsel, then the Jackson rule does not apply, the accused may be approached, and Fifth Amendment principles govern. See, specifically allowing a police interview after the attachment of the Sixth Amendment right because the defendant "at no time sought to exercise his right to have counsel present." 108 S Ct at 2394.

Analysis

A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.⁴

Until its relatively recent revival, Massiah was fairly regarded as an "oddball sixth amendment 'confession' case." Kamisar, *Brewer v Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 Geo L J 1,34 (1978). This is so because, as Professor Grano has pointed out, "The sixth amendment has traditionally functioned as a sword, enabling defendant to test the truth of the prosecutor's evidence and to present his best defense." 17 Am Cr L Rev at 9. The Massiah/Williams/Jackson use of the Sixth amendment as a shield, however, which has

4. Ely, *The Wages of Crying Wolf: A Comment On Roe v Wade*, 82 Yale L J 920, 949 (1973)

as its purpose the protection of the accused from revealing legal, relevant evidence, see Grano, 17 Am Cr L Rev at 9-10, fn 59, is of far more recent creation, and is more controversial. Its constitutional validity is problematic. Professor Grano has attempted to construct a defense of the right to counsel's shield function, recognizing that if "I fail to connect the right to counsel's shield function to the sixth amendment, I am prepared to concede that Massiah and Williams should be overruled," and noting that "the shield function is not easy to defend at any stage of the process." 17 Am Cr L Rev at 18. (Professor Grano has since expressed his doubt that the "shield function" of the right to counsel "is appropriate at any stage of the process." Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern

Confessions Law, 84 Mich L Rev 662, 682, fn 84 (1986)).

It should first be noted that Chief Justice Rehnquist's observation in dissent in Henry that to "the extent that Massiah relies on Powell v Alabama...Massiah reads the language of Powell out of context" is clearly correct. See 447 US at 294. Powell had absolutely nothing to do with a shield function for the Sixth Amendment--no otherwise legal and relevant evidence was suppressed because of an absence of counsel at the time of its disclosure; rather, the case was instead concerned that the defendants had been deprived of the "sword" of counsel until the very day of trial, and that effective use of the sword required its provision sufficiently in advance of trial for reasonable preparation to meet the prosecution's case. The remedy in this situation is to provide counsel at an

appropriate time before trial. In contrast, in Massiah the accused had counsel sufficiently in advance of trial. The requirement of counsel imposed there was not for the purpose of assistance in preparation for trial, nor actually to achieve the presence of counsel during the conversation, but to preclude the accused from disclosing relevant information to the police. As Professor Uviller has stated, the majority in Massiah "could not have meant literally that Massiah's lawyer should have been sitting with him in Colson's car as the two erstwhile cohorts discussed their case. The idea is ludicrous....To hold that an accused defendant shall not be interrogated, or given the opportunity to speak to the police or their secret agents, except with a lawyer on hand, is simply to direct that they shall not be heard to speak their

minds, period." 87 Columbia L Rev at 1160-1161. Plainly the pretrial provision of counsel mandated by Powell was not for the purpose of denying access to the accused to the police, and the creation of a shield function for counsel out of a quotation from a precedent concerned with its sword function is unpersuasive.

Other attempts to justify a shield function for counsel founder in a sea of unprincipled line-drawing, and leave only an unspoken basis for its creation--a hostility to police interrogation. See e.g. Miranda v Arizona, 384 US 436, 537-38 (1966) (Justice White, dissenting): "The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions....This is the not so subtle overtone of the opinion--that it is inherently wrong for the police to gather evidence from the accused himself."

Line-drawing is unavoidable. Counsel is to perform a shield function in the confessions context, but not before arrest, and not after arrest until the institution of formal judicial proceedings (except in terms of a Miranda warning, and this goes solely to voluntariness under the Fifth Amendment). If arraignment occurs very promptly, the shield function begins; if it does not, then the shield function does not begin, and the delay is a factor to be considered only in a Fifth Amendment voluntariness assessment. Once formal judicial proceedings have commenced, the shield function begins; however, it applies only when the police take action designed deliberately to elicit incriminating remarks, and does not apply when the police or their secret agent merely listen to the accused. Moreover, after the shield function has commenced at arraignment the

police nonetheless may approach the accused and obtain a voluntary waiver of it, unless the accused has requested counsel at the arraignment, in which case all access to the accused is denied. If, on the other hand, the accused at arraignment declines a proffered appointment of counsel, choosing perhaps to retain his own counsel, then until that event occurs the police are free to seek access to the accused, and to obtain a voluntary waiver of the Sixth Amendment shield function which, though it has attached, has not yet officially been claimed. It is suggested that the line-drawing involved in this jurisprudence is in want of a constitutional rationale --certainly it cannot be said that the defendant "needs" protection from himself more in one situation than another. And as Professor Grano has well put it, "This suggests that for those who persist in

asking why the right to counsel should not attach before adversary judicial proceedings, the appropriate constitutional response may be to ask why it should attach afterwards." Grano, 17 Am Cr L Rev at 18.

Determination of when, and under what circumstances, the shield function of the right to counsel should apply to confessions or admissions is far from the only line-drawing difficulty with the entire doctrine. If the right to counsel truly contains, as a matter of a proper construction of the Sixth Amendment, a shield function which applies to confessions under some circumstances, on what principled basis is it denied to the accused in other circumstances where counsel might act either to shield the accused from disclosure of relevant evidence or to assist him by being present at a procedure "important" to the case?

What of presentation of evidence to a grand jury? There is no right to counsel in the room during testimony. United States v Mandujano, 425 US 564 (1976). What if the police obtain and execute a search warrant, either before or after formal proceedings have begun? The suspect or accused has no right to counsel either at the issuance or the execution of the warrant. Whether before or after the institution of formal proceedings the police might request of the accused his consent to a search (with no questioning about the crime). There is no requirement that counsel be present. Further, witnesses may be interviewed by the police or prosecution, and scientific tests conducted (even on evidence obtained from the accused), all in the absence of counsel for the accused. And, as Kuhlman v Wilson demonstrates, passive auditory surveillance may be conducted in the

absence of counsel and without warning. See Uviller, 87 Columbia L Rev at 1136-1137.

If, then, a shield function for the right to counsel has been imported into the jurisprudence of confessions by the appropriation of language and rationale from a case concerned with its function as a sword, and if there is no other satisfactory justification for its existence, what then?⁵ It is not necessarily the case that this Court should back up and start over, though that is certainly one viable option. But if the Massiah/Jackson line of Sixth Amendment precedent is in search of a rationale under the Constitution, at least it might be said

5. In his attempt to construct a possible defense for Massiah, which he later stated he doubted was possible, Professor Grano insisted that "I am unwilling to abide assertions that Massiah and Williams are right because they reach 'good' results." Grano, 17 Am Cr L Rev at 18, fn 112.

that it should be extended no further. As Professor Grano has said, "the fact that we may have to live with past mistakes hardly supports an argument that we should continue to err in our ways." Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 Wayne L Rev 1, 73, fn 310 (1981). Justice Blackmun in Henry stated his view that "Massiah certainly is the decision in which Sixth Amendment protections have been extended to their outermost point" and that the majority opinion was an expansion for which he could "not perceive any good reason." Justice (now Chief Justice) Rehnquist, also in Henry, took the position that "Massiah constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding should be re-examined." In dissent in Maine v

Moulton Chief Justice Burger quoted with approval from Justice Blackmun's dissent in Henry, and insisted, as to the Massiah precedents, that he would "not expand them more and well beyond the limits of precedent and logic." Justice White dissented in Massiah itself, in Williams, and in other of the Sixth Amendment cases discussed above. Justice O'Connor has also joined dissents in a number of the Sixth Amendment/confession cases discussed above. A strong case exists, then, that at the very least the Court should restrain the Massiah/Williams/Jackson line of authority within existing bounds.

B. Impeachment Use of "Illegally"
Gained Evidence

Beauty is truth, truth beauty,--that is all
Ye know on earth, and all ye need to know.

Keats, Ode On A Grecian Urn

This Court has observed that "arriving at the truth is the fundamental goal of our legal system" (emphasis added). United States v Havens, 446 US 620, 626 (1980).

Regarding cross-examination as a mechanism for the discovery of truth at trial Wigmore made the celebrated statement that "it is beyond any doubt the greatest legal engine ever invented for the discovery of truth....cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 Wigmore, Evidence, s.1367, p.32. While overarching constitutional principles may at times prevent the introduction of relevant evidence to prove guilt, this Court has not departed from the

principle that "arriving at the truth is the fundamental goal of our legal system" by prohibiting use of that same evidence on cross-examination, save one exception --statements which are involuntary under the Fifth Amendment. Petitioner submits that this Court should continue this course.

This Court first considered the question of impeachment use of "illegally" or impermissibly obtained evidence some 35 years ago, and in a Fourth Amendment context, in Walder v United States, 347 US 62 (1954). Walder had been indicted for purchasing and possessing heroin, but the case against him was dismissed after the evidence was suppressed on the ground that it was seized pursuant to an impermissible search at Walder's home. A year and a half later, Walder was again indicted, this time for four other narcotics transactions, and

the case turned on the testimony of two addicts who claimed to have purchased narcotics from Walder at the direction of federal agents. Walder himself was the only defense witness, and thus the case was a credibility contest, turning on the relative believability of Walder as against the two addicts.

On direct examination Walder testified that he had never sold narcotics to anyone in his life, and had never possessed narcotics; further, he had never given narcotics to anyone as a gift or in any other manner, or acted as a conduit in the transfer of narcotics from one person to another. On cross-examination, Walder reiterated these denials, and, over objection, was questioned regarding the heroin seized from his home some months previously. Walder denied narcotics had been seized at that time (which directly

contradicted the affidavit the defense had filed in that case when it successfully moved to suppress the evidence). 347 US at 63-64. The Government was then allowed to present testimony from an officer who had participated in the prior search, and also testimony from the chemist who had analyzed the substance seized, to impeach Walder's claims. The jury was instructed that the testimony was permissible solely to impeach Walder's credibility. 347 US at 64.

Writing for the Court, Justice Frankfurter held that "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his

untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment" (emphasis added). 347 US at 65. Walder's conviction was thus affirmed by the Court.

Over 25 years later this Court again considered impeachment use of evidence seized unlawfully under the Fourth Amendment. In United States v Havens, 446 US 620 (1980) Havens and a confederate (both attorneys) boarded a plane bound for Miami, Florida from Lima, Peru. In Miami cocaine was found on the confederate, who implicated Havens, who had already cleared customs. Havens was arrested, and his luggage seized and searched without a warrant. Though no narcotics were found, the material from which the container for the narcotics used by Havens' confederate was made was found in the luggage. Prior to trial, this evidence was suppressed as illegally seized.

At trial Havens' confederate testified against him, stating that Havens' had supplied the container for the drugs (an altered T-shirt with sewn in pockets). Havens testified, and on direct examination specifically denied engaging in the drug smuggling activity detailed by his confederate. On cross-examination, he stated that on direct he had said that he "had nothing to do with anything with McLeroth (the confederate) in connection with this cocaine matter." He was then asked if had anything to do with the making of the pockets on the confederate's T-shirt, whether he had on the date and time in question a T-shirt in his luggage with swatches of cloth missing from it (which matched the pocket's sewed into McLeroth's T-shirt), and, when shown the T-shirt in question, whether that T-shirt had been in his luggage. He denied all

participation or knowledge in the scheme. 446 US at 622-623. A government agent was then allowed to testify that the T-shirt with material missing was found in Havens' luggage, and the T-shirt itself was admitted, with an instruction from the Court that the evidence was to be considered only for the purpose of assessing Havens' credibility. 446 US at 623.

The Court of Appeals reversed, distinguishing Walder because the precise questions asked of Havens which formed the basis of his impeachment had been asked on cross-examination rather than direct examination. This Court found this to be a distinction without a difference. Citing Fifth Amendment cases, to be discussed subsequently, the Court held that the shield against direct use of illegally seized evidence could not be "perverted

into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 446 US at 626. The Court also found that the deterrent function served by excluding illegally gained evidence from admission as substantive evidence was sufficient, it being only a "speculative possibility" that "also making it unavailable to the government for otherwise proper impeachment would contribute substantially in this respect." 446 US at 626.

The Court reached its conclusion that impeachment was appropriate, so long as the answers given were given to questions which were within the proper scope of cross-examination, because of the principle that "arriving at the truth is the fundamental goal of our legal system" (emphasis added). 446 US at 626. That

being the case, it is essential to a "proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth." 446 US at 627. The proper balance, concluded the Court, between the interest of insuring appropriate police conduct, and that of insuring a fact-finding process most likely to get at the truth, was struck at disallowing direct use of illegally seized evidence and allowing impeachment use of the same evidence, whether the answers given from the accused came on direct examination or from questions within the proper scope of cross-examination. 446 US at 627-628.

Similar results have obtained in the Fifth Amendment context, with a notable exception, to be discussed subsequently. In Harris v New York, 401 US 222 (1971)

Harris was charged with selling heroin, and made statements to the police after having been given an imprecise warning of his rights under Miranda (the warning failed to advise him of his right to appointed counsel). 401 US at 223-224. On direct examination he denied making a sale to an undercover officer on a particular date, and admitted a sale on a subsequent date, but claimed the content of the glassine bag he sold was baking powder as a part of a scheme to defraud the purchaser. He was questioned with regard to statements to the police which partially contradicted his testimony, and the statement was placed in the record for appeal, though not read to the jury. The jury was instructed that the statements attributed to Harris were admissible solely for gauging his credibility. 401 US at 223-224. There had been no claim made that

the statements were involuntary. 401 US at 224.

Citing Walder, this Court upheld the impeachment of Harris. "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility," said the Court, "and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby." 401 US at 225. The Court concluded by observing that "the prosecution here did no more than utilize traditional truth-testing devices of the adversary process....The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 US at 225-226.

The question was revisited in Oregon v

Hass, 420 US 714 (1975). After first disposing of the contention of the Oregon Supreme Court that it was free to set a higher federal constitutional standard than that set by the United States Supreme Court, the Court turned to the issue at hand. Hass was arrested for a burglary, and given appropriate Miranda warnings. After making some statements, Hass indicated that he believed that he "was in a lot of trouble" and wanted to telephone his attorney. The officer told Hass he could telephone the attorney "as soon as we get to the office," but prior to that time Hass revealed where stolen property was located. 420 US at 715-716. It was ruled that statements made by Hass after his request for counsel, including his identification of the location of stolen property, were inadmissible.

On direct examination Hass testified

that he did not see any of the property being taken (bicycles) and did not know "where those residences were located." In rebuttal, statements made by Hass after his request for counsel were introduced, to the effect that he had pointed out the houses where the bicycles were taken, and had stated that he knew where they came from but didn't know the exact street address. 401 US at 717. The jury was instructed to consider this testimony only as it bore on Hass's credibility.

Relying heavily on Harris, this Court upheld the use of the statements for impeachment purposes--"Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, 'the benefits of this process should not be lost,'...and again, making the deterrent-effect assumption, there is

sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief....Here, too, the shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjurally, free from the risk of confrontation with prior inconsistent utterances." 420 US at 722.

Speaking directly to the question of deterrence, Justice Blackmun, writing for the Court, observed that

One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in Harris, and we are not disposed to change it now (emphasis added).

420 US at 723. Thus, so long as the statements obtained were trustworthy; that

is, voluntary, impeachment use would be appropriate. This holding of Hass fits precisely the situation in the instant case.

It is worth observing that both Harris and Hass involve counsel considerations, albeit in the Fifth Amendment context. In Harris the warnings failed to inform defendant of his right to appointed counsel, and his statements subsequent to those defective warnings were allowed for impeachment. In Hass appropriate warnings were given, but after a request for counsel interrogation did not cease. Impeachment with statements taken subsequent to the assertion of the Miranda counsel right were permitted by this Court. Petitioner submits that there is no principled basis by which the result in Hass can be avoided in the instant case.

Mention should also be made here of

Edwards v Arizona. Though Hass predates Edwards, its holding seems clearly to apply to statements taken in violation of Edwards, though Edwards itself is not an impeachment case. After his arrest on robbery, burglary, and murder charges Edwards was given his Miranda warnings. After some discussion regarding a "deal," Edwards stated "I want an attorney before making a deal" and all questioning ceased; however, the next day, after further warnings, questioning began again and incriminatory statements were taken. The statements were held to be voluntary. This Court, reversing the conviction, established the "bright line" rule that once an accused requests counsel during interrogation he is "not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates

further communication, exchanges or conversations with the police." 451 US 484-485. Of course, an Edwards violation is precisely what occurred in Hass. It should be clear, then, that statements taken in violation of Edwards fall within the rule of Hass allowing impeachment, and that is what courts considering the question have held.⁶ See e.g. Brittingham v State, 492 A 2d 354 (1985); State v Mills, 710 P 2d 148 (Or App, 1985); State v Cody, 323 NW 2d 863 (SD, 1982); United States v Hinckley, 672 F 2d 115 (CA DC, 1982); United States ex rel Adkins v Greer, 791 F 2d 590 (CA 7, 1986), cert den 479 US 989 (1986); People v Paintman, 139 Mich App 161 (1984).

6. Petitioner must note puzzlement with a doctrine which prohibits the use of voluntary (though Miranda defective) statements as substantive evidence--these opinions raise grave questions of its constitutional authority vis a vis the States. The Court has on more than one occasion (con't)

(con't) recognized that the procedural safeguards of Miranda "...(are) not themselves rights protected by the Constitution" (emphasis added). Michigan v Tucker, 417 US 433 (1974). Indeed, Harris and Hass are cases where the Court has explicitly recognized that it is possible for a Miranda-defective confession to be voluntary nonetheless; that is, not compelled. The confession is thus excluded as proof of guilt in these cases because of the violation of a right not itself "protected by the Constitution" though the very right protected by the Constitution, the right not to be compelled to be a witness against oneself, has not been violated. It seems logically unavoidable that from the moment the Court recognized that not every Miranda defective confession is involuntary, it in essence recognized that Miranda was wrongly decided.

The principal Miranda error lies in the translation of the right against compulsory self-incrimination into a "right to remain silent," from which logically flows the notion that when one voluntarily consents to make a statement he is thereby waiving a constitutional right, the right to remain silent, thus bringing into play the constitutional doctrine that waivers of constitutional rights must be "knowing, voluntary, and intelligent" as articulated in Johnson v Zerbst, 304 US 458 (1938). But this constitutes a fundamental misreading of the language of the Fifth Amendment. There is no constitutionally guaranteed right "to remain silent" which is waived by a voluntary consent to speak; there is, rather, a constitutionally guaranteed right not to be compelled to speak, which can never be waived, which is simply logically incapable of waiver. If, then, when one (con't)

speaks he is not waiving a right, he is either speaking voluntarily or he is not, then the entire waiver analysis of Miranda must be seen as unsupported by the language of the Fifth Amendment, and so also that of Edwards, which requires suppression of a confession because of a failure to demonstrate that the accused waived a right which is "not itself protected by the Constitution"! What is left, then, is the only test which squarely comports with the language of the Fifth Amendment: under the totality of the circumstances, was the statement voluntarily given, or was it compelled? See Baughman, Michigan, Miranda, and Focus: Now You See It, Now You Don't, 1985 Detroit Col of L Rev 801, 812-815 (1985).

Further, not only is the waiver analysis of the Fifth Amendment inappropriate given the language of the Amendment, but once the Court recognized that not every Miranda-defective confession can be said to have been gained in violation of the Fifth Amendment (that is, coerced), it admitted that it had gone beyond its Article III power in Miranda, for if it is true in a particular case that a confession is voluntary though Miranda-defective, so as to be admissible for impeachment, then from whence comes the constitutional authority of the United States Supreme Court to order a state court to exclude from evidence a confession gained in violation of no constitutional right (it being remembered that the Miranda rights are not themselves "rights protected by the Constitution")? Certainly not from Article III of the Constitution, giving all Judicial Power "in Law and Equity, arising under this Constitution, the Laws of the United States...." to the federal courts (emphasis (con't))

added). See Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW U L Rev 100 (1985), for a thorough discussion of the Article III questions raised when a State is compelled by decisions of the Supreme Court to suppress evidence which was gained absent any violation of the Constitution.

In any event, this Court has allowed impeachment with voluntary confessions made after defective warnings regarding the right to counsel, and after assertion of the Miranda counsel right. There is a circumstance, however, in which this Court has disallowed use of statements for impeachment purposes, and that is when rather than being Miranda-defective, the statements are involuntary. Rather than having been taken in violation of prophylactic rules, these statements have been taken in violation of the constitutional proscription of the Fifth Amendment that no person shall be compelled to be a witness against himself. For example, in Mincey v Arizona, 437 US 385 (1978) Mincey had been seriously wounded, and was hospitalized "depressed almost to the point of coma." He complained that he was in "unbearable" pain, and was connected

to tubes and breathing apparatus; moreover, he expressed his desire not to be interrogated without a lawyer, and was nonetheless interrogated for an extensive period of time. This Court found the resulting statements involuntary. This being so, due process required that they not be used "in any way against a defendant at his trial." 437 US at 401.

This Court has also made clear that the rule that confessions taken in violation of the Fifth Amendment itself may not be used for any purpose does not turn on the fact that such statements are ordinarily unreliable or untrustworthy. A situation where reliability was not a concern arose in New Jersey v Portash, 440 US 450 (1979). Portash, mayor of a city, was called before an investigative grand jury by subpoena. He stated his intention to assert his right not to be compelled to incriminate himself, and as a result was

extended "use" immunity. Because of the use immunity, Portash was required to testify under penalty of imprisonment for contempt if he refused. Subsequently, he was indicted for misconduct in office and extortion by a public official. The trial court ruled that if Portash testified in a manner materially inconsistent with his grand jury testimony, that testimony could be used for impeachment. As a result, Portash did not testify at all. 440 US 452. This Court held that ruling improper. Distinguishing Harris and Hass on the ground that in those cases there had been "no claim that the statements made to the police were coerced or involuntary," the Court held that this "recognition was central to the decisions in those cases." 440 US at 458-459. Though the statements in this situation were coerced in a different sense than those in Mincey,

nonetheless "testimony given in response to a grant of legislative immunity is the essence of coerced testimony....the information given...may be more reliable than information beaten from a helpless defendant, but it is no less compelled." 440 US at 459. Because in Portash the Court was concerned with "the constitutional privilege against compulsory self-incrimination in its most pristine form" any balancing of interests was simply "impermissible," and no use of any kind could be made of the statements. 440 US at 459.

Thus, evidence seized unlawfully under the Fourth Amendment may be used for impeachment purposes, whether the answers to be impeached come on direct or to questions asked within the proper scope of cross-examination; statements taken after improper Miranda warnings, or after an

invocation of a Miranda right, including the Miranda right to counsel, may be used for impeachment purposes; and statements taken in violation of the Fifth Amendment itself--statements which are coerced or involuntary--may not be used for any purpose. What, then, of violations of the Sixth Amendment under Massiah/Williams/Jackson?

Two federal circuit cases demonstrate the argument that statements taken in violation of the Massiah/Williams/Jackson counsel right should not be admissible for impeachment. The lead case is United States v Brown, 699 F 2d 585 (CA 2, 1983). Brown was arrested for a bank robbery. One of the robbers, identified as Brown, had allegedly vaulted a 10 to 12 foot high "bandit barrier," and then opened the door to the tellers' area. Brown testified that several days prior to the robbery, on a

challenge from his girlfriend, he had demonstrated his jumping ability by touching the top of the barrier. He denied knowing one of the other perpetrators of the crime and denied having anything to do with the robbery.

On cross-examination, Brown was questioned about a prior statement given to an FBI agent which admitted involvement in the robbery, including vaulting over the bandit-barrier. The statement was taken after Brown's indictment, and approximately an hour before his arraignment. Apparently the government had conceded the taking of the statement after indictment was without a valid waiver of counsel and thereby in violation of the Sixth Amendment rights of Brown; however, the statement was used only for impeachment. In reaching its conclusion that impeachment was improper, the court stated that Miranda warnings were

insufficient for a post-indictment /pre-arraignment waiver of the right to counsel, a holding which is now untenable in light of Patterson v Illinois, supra, which held to the contrary. The court relied primarily upon Mincey and Portash, holding, as this Court did in Portash with involuntary confessions, that where the Sixth Amendment is involved "balancing is impermissible." 699 F 2d at 590. Again, weighing heavily for the court was its belief, later proven mistaken by Patterson, that the waiver of the Sixth Amendment right to counsel after indictment is "measured by a 'higher standard' than are waivers of Fifth Amendment rights." 699 F 2d at 590.

The second case is Meadows v Kuhlman, 812 F 2d 72 (CA 2, 1987), also a Second Circuit case, reversing, on federal habeas corpus review, the reasoning in People v Meadows, 476 NYS 2d 230 (2d Dept. 1984),

though upholding the convictions on a harmless error analysis. In Meadows the defendant was arrested for gas station robberies, on a state complaint and warrant. After Miranda warnings he confessed. Subsequently he was indicted, and was represented at arraignment by retained counsel. It was held in the state court that the statements given after the complaint and warrant had issued were inadmissible as substantive proof because "the right to counsel had attached, and yet counsel was not present when the statements were made," a proposition clearly incorrect as a matter of federal constitutional law under Patterson. Because the statements were voluntary, however, the trial court ruled them admissible for impeachment purposes, and Meadows' trial denials of involvement in the crimes were impeached with the statement he gave to the police.

The convictions were upheld by the state courts, see People v Meadows, 476 N Y S 2d 230 (2d Dept 1984), and on federal habeas corpus review the district court agreed. The circuit court, however, relying on Brown, disagreed, but found the error harmless.

What of other jurisdictions? As Meadows demonstrates, New York takes a contrary view to that of the Second Circuit. Another example from New York is People v Grainger, 498 N Y S 2d 940 (A.D. 4 Dept 1986). Grainger was arrested for a market robbery, and made admissions to the police. Some months later, Grainger's girlfriend's mother reported to the police and prosecution that she was being harassed by the defendant on the telephone, and wished her calls recorded. A tape recorder was installed, but the police and prosecution failed to instruct the woman

not to solicit conversation from Grainger regarding the charged offense. During one call she interrogated Grainger regarding the crime, and he finally made admissions.

The statement was suppressed under authority of Maine v Moulton, because the prosecution and police failed in their "obligation not to act in a manner that circumvents and thereby dilutes the protection" of the Sixth Amendment. 498 N Y S 2d at 943. Citing Harris, Hass, and People v Ricco, 437 N E 2d 1097 (1982), a New York case also relied upon by the court in People v Meadows, the court stated that "It is well settled that statements obtained in violation of defendant's right to counsel, although not admissible as evidence-in-chief, may be used for impeachment purposes should defendant choose to testify...." 498 N Y S 2d at 944. Because of a procedural error in the manner

in which the impeachment occurred, the conviction was reversed, though impeachment itself was held to be proper. See also People v Maerling, 474 NE 2d 231 (NY, 1984), noting, but not following, Brown.

Impeachment was also held proper in State v Thomas, 698 S W 2d 942 (Mo App 1985). Thomas, a juvenile, was charged with felony murder. He was arrested on an unrelated matter in another state, and returned under an interstate compact. When an officer traveled to Indiana to retrieve Thomas he took a statement from him in the presence of a juvenile officer and Thomas's mother, and a portion of this statement was used at trial for impeachment. The appellate court found that the statement was voluntary; however, the court found that, though the request was ambiguous, Thomas had requested counsel after being given Miranda warnings. As a matter of

Fifth Amendment law the court found impeachment proper. Though Thomas had no counsel at the time of questioning, he also asserted that his right to counsel had nonetheless attached. The court found a determination of this question unnecessary, because it observed that impeachment had been allowed in Hass after the defendant invoked his Miranda right to counsel, and the court perceived "no reason why that principle is not applicable even if the defendant's statement was taken in violation of the Sixth Amendment....To hold otherwise would, contrary to the principle announced in those cases, permit a constitutional shield to 'be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.'" 698 SW 2d at 949. See also People v Bacino, 354 NE 2d 641 (Ill App, 1976), also relying on Hass.

Other federal circuits than the Second Circuit have considered the question and reached contrary results from that circuit. In United States v McManaman, 606 F 2d 919 (CA 10, 1979) a government agent, wearing an electronic transmitter, engaged the defendant in conversation after the defendant had been charged, retained a lawyer, and released on bail. Citing Walder, Harris, and Hass the court stated that though "these are not cases decided in the context of conduct which was illegal under the Massiah Sixth Amendment rule....we feel that the same reasoning applies here." 606 F 2d at 925. So also in United States v Taxe, 540 F 2d 961 (CA 9, 1976).

Impeachment use of illegally seized evidence is thus allowed where evidence is illegally seized under the Fourth Amendment, and also with statements taken

in violation of Miranda, whether the violation be a failure of warnings completely, imprecise warnings (including on the right to counsel), or a continuation of interrogation after an assertion of a Miranda right (including the right to counsel). The one circumstance where impeachment is not permitted is where the statement taken was taken in violation of the Fifth Amendment right against compulsory self-incrimination, and this circumstance is different from all others because the very right involved is directly concerned with compelled testimonial evidence from the mouth of the defendant.

The Sixth Amendment, the area where courts are inconsistent, is not directly concerned with compelled testimonial evidence from the mouth of the defendant. In a context which cannot be distinguished, this Court in Hass has stated:

One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in Harris, and we are not disposed to change it now (emphasis added).

The trial as a truth-seeking adventure requires the admission of the evidence for impeachment purposes in this context. As well-put by Justice Blackmun in Hass: "Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, 'the benefits of this process should not be lost,'...and again, making the deterrent-effect assumption, there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief....Here,

too, the shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjurally, free from the risk of confrontation with prior inconsistent utterances."

Conclusion

The respondent in the instant case, after the attachment of the right to counsel, and its exercise (the appointment of counsel), initiated a contact with the police to make a further statement. However, because of an ambiguous request for counsel which was not honored the Michigan Court of Appeals found that the subsequent statement given by the accused was taken in violation of his Sixth Amendment rights. Petitioner has sought to demonstrate that the line of cases requiring this holding stand on less than solid ground, and for this reason should not be extended. That statement was

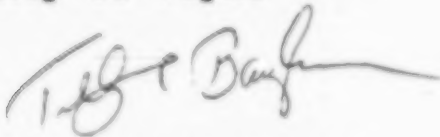
voluntary, and used only for impeachment purposes. The concerns expressed, and the balancing achieved, in Walder, Havens, Harris, and Hess, and not those of Mincey and Portash, obtain in this situation. This Court should thus hold the impeachment here was proper, and reverse the Michigan Court of Appeals.

RELIEF

WHEREFORE, petitioner requests that
the Michigan Court of Appeals be reversed.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne

A handwritten signature in dark ink, appearing to read "Timothy A. Baughman", with a long horizontal flourish extending to the right.

Timothy A. Baughman
Chief of the Criminal Division
Research, Training and Appeals

